

- (1) What is the nature and extent of claimant's injury and/or disability?

- (2) Did the Administrative Law Judge err in charging respondent interest on the unpaid amounts of permanent disability due and owing pursuant to K.S.A. 44-512b (Furse 1993)?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant alleges that he is permanently and totally disabled as a result of an injury occurring on August 2, 1996. The Administrative Law Judge noted, and the Board agrees, that the medical opinion of Glenn M. Amundson, M.D., the board certified orthopedic surgeon who provided treatment for claimant over a period of several years, is the more credible opinion in the record. Dr. Amundson, even with the concerns about the functional capacity evaluation (FCE) utilized, found claimant to have the ability to perform certain jobs in the open labor market. He did not find claimant to be totally disabled. The Board acknowledges that claimant's expert, Daniel D. Zimmerman, M.D., found claimant to be permanently totally disabled. However, the physical limitations presented to Dr. Zimmerman by claimant question the accuracy of his evaluation. Dr. Zimmerman was advised that claimant could only stand for a little more than a minute or sit for five minutes before having to change positions. The FCE performed by registered physical therapist Lydia Neu, RPT, indicated a substantially greater ability on claimant's part to both sit and stand. The three and a half hour test indicated claimant was capable of sitting for substantial periods of time without the limitations described by Dr. Zimmerman. Additionally, when asked, Dr. Zimmerman acknowledged that he was not testifying that there were not jobs out there claimant could do. He was testifying that claimant is 100 percent medically disabled. When asked if he felt claimant could work, his response was "I don't know."<sup>1</sup> The Board finds that while claimant is substantially limited, he is not permanently totally disabled as is defined in K.S.A. 44-510c (Furse 1993).

The more interesting issue involves the assessment of interest penalties against respondent pursuant to K.S.A. 44-512b (Furse 1993). Claimant had been paid temporary total disability compensation totaling \$88,601.51. Respondent acknowledged both at the pre-hearing settlement conference and at the regular hearing that claimant's disability would exceed the \$100,000 statutory limitation set forth in K.S.A. 44-510f (Furse 1993). The Administrative Law Judge admonished respondent's attorney that the undisputed amounts above that had already been paid would be due and owing and it would be wise

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<sup>1</sup> Zimmerman Depo. at 26-27.

to pay those amounts. Additionally, there was some question as to why the amounts had not already been paid, as the temporary total disability compensation had long since ceased. Finally, as claimant's injury occurred in August of 1996, there was no doubt, with the accelerated payment schedule of K.S.A. 1996 Supp. 44-510e, that the entire balance of \$100,000 would have been due and owing well before the regular hearing.

The Administrative Law Judge assessed interest at the rate prescribed by K.S.A. 16-204(e)(1) and amendments thereto on the amount which remained due and owing above the temporary total disability compensation already paid.<sup>2</sup> The Board finds that with \$88,601.51 in temporary total disability compensation having been paid, the amount which would remain due and owing would be \$11,398.49.

K.S.A. 44-512b (Furse 1993) states in part:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

In this case, there was no dispute that claimant's entitlement to benefits would exceed the \$100,000 statutory limitation. Claimant's temporary total disability compensation was so substantial that it would have taken little impairment to reach the statutory maximum. Respondent's own expert, Dr. Amundson, provided both functional limitations and task loss limitations, which would have caused the award to exceed the limitations set forth. Respondent's attorney acknowledged both at the pre-hearing settlement conference and at regular hearing that the statutory maximum would easily be met in this instance. The Board has ruled that before interest may be awarded, there must be an absence of just cause or excuse for failing to pay the benefits before the Award.<sup>3</sup> K.S.A. 44-512b(a) (Furse 1993) allows such interest to be assessed "from the date such compensation was due." The payment of the amount due and owing was not received by claimant until August 4, 2003, several weeks after the June 19, 2003 hearing and well after the payments of temporary total disability compensation ceased. The Board finds the determination by the Administrative Law Judge that interest was appropriate under K.S.A.

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<sup>2</sup> In the Award, the Administrative Law Judge assessed interest on the amount of \$11,685.43. However, the Board finds that the amount on which interest should be assessed is \$11,398.49.

<sup>3</sup> *Rivera v. Jostens Printing & Publishing*, No. 261,965, 2003 WL 359861 (Kan. WCAB Jan. 30, 2003).

44-512b (Furse 1993) should be affirmed, but finds that the amount on which interest should be assessed should be modified as stated above.

The Board acknowledges respondent objects to the assessment of penalties, arguing that no demand for compensation was made. However, K.S.A. 44-512b (Furse 1993) does not require a demand. It merely requires a hearing conducted pursuant to K.S.A. 44-523 (Furse 1993), which, in this case, occurred at the time of the regular hearing on June 19, 2003. Additionally, it requires that there be no just cause or excuse for the failure of the employer or insurance company to pay. In this instance, respondent provided no just cause or excuse for its failure to pay the relatively small amount remaining due after the substantial temporary total disability compensation had been paid in this matter. The Board finds that interest as prescribed pursuant to K.S.A. 16-204 and amendments thereto, shall be assessed against respondent and its insurance carrier pursuant to the Award of the Administrative Law Judge.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 22, 2003, should be, and is hereby, affirmed as modified.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director